NO. 02-20-00290-CV

TIE LASATER and KEYCITY CAPITAL, LLC, *Appellants,*	§	**IN THE SECOND**
	§	
	§	
v.	§	
	§	
COREY THOMPSON, *Appellee.*	§	**COURT OF APPEALS**

RESPONSE TO APPELLEE'S MOTION TO DISMISS FOR WANT OF JURISDICTION

TO THE HONORABLE JUSTICES OF SAID COURT:

COME NOW Appellants, Tie Lasater and KeyCity Capital, LLC, and file this their Response to Appellee's Motion to Dismiss for Want of Jurisdiction, and in support thereof would respectfully show the Court as follows:

SUMMARY OF THE ARGUMENT

This case is not an accelerated appeal and Appellants have timely invoked this Court's jurisdiction. Appeals are generally considered to proceed according to the standard deadlines unless some authority clearly and explicitly provides that they are to be expedited or accelerated. Appellees seek too broad an interpretation of the statute that is arguably ambiguous. While there do not yet appear to be any controlling opinions addressing this issue directly, the plain language of the statute and the language of a number of appellate opinions indicate expedited appeals of final judgments only apply to a denial of a TCPA motion. None of the authorities relied upon by Appellee address this specific issue dead-on, but instead, Appellee

relies on dicta and an overbroad interpretation of the holdings therein.

I. APPELLANTS' NOTICE OF APPEAL WAS TIMELY FILED UNDER THE UNACCELERATED APPELLATE TIMETABLES

Texas Rule of Civil Procedure 26.1(a)(2). Texas Rule of Civil Procedure provide that "A motion to modify, correct, or reform a judgment… shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial." Texas Rule of Civil Procedure 328b(g). Texas Rule of Appellate Procedure 26 provides that, in civil cases, "The notice of appeal must be filed within 30 days after the judgment is signed, except as follows: (a) the notice of appeal must be filed within 90 days after the judgment is signed if any party timely files: … (2) a motion to modify the judgment…."

The trial court granted Appellee's Motion to Dismiss Pursuant to the TCPA on May 26, 2020. After a hearing on attorney's fees, the trial court signed a Final Judgment, dismissing Appellants' claims and awarding Appellee attorney's fees on July 1, 2020. On July 29, 2020, Appellants filed their Motion for Reconsideration with the trial court, requesting modification of the judgment. This Court received jurisdiction when on September 14, 2020, seventy-five days after the judgment was signed, Appellants filed their Notice of Appeal.

II. ACCELERATION OF APPEALS APPLIES ONLY TO DENIALS OF TCPA DISMISSAL MOTIONS PURSUANT TO THE PLAIN LANGUAGE OF THE STATUTE, THE INTENTION OF THE LEGISLATURE, AND LANGUAGE CONTAINED IN VARIOUS OPINIONS

Tex. Civ. Prac. & Rem. Code Section 27.008(a) provides: "If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal." Section 27.008(b) further provides: "An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005." While there was initially some question among the courts as to whether subsection (a) actually authorized an interlocutory appeal, the legislature subsequently clarified the issue by passing Tex. Civ. Prac. & Rem. Code 51.014(a)(12): "(a) A person may appeal from an interlocutory order … that: … (12) denies a motion to dismiss filed under Section 27.003…."

Provisions within statutes must be interpreted in the context of the statute as a whole. See *Bridgestone/Fireston, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex. 1994) ("Words in a vacuum mean nothing. Only in the context of the remainder of the statute can the true meaning of a single provision be made clear. *Cf. Merchants*

Fast Motor Lines, Inc. v. Railroad Comm'n, 573 S.W.2d 502, 505 (Tex.1978); *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex.1978).”). As the Supreme Court of Texas stated in *Lunsford v. City of Bryan*, 156 Tex. 520, 297 S.W.2d 115, 117 (1957): “Numerous decisions by this court have established the rule that courts are not bound by the literal meaning of words in the construction of statutes, but when the intent and purpose of the Legislature is manifest from a consideration of a statute as a whole, words will be restricted or enlarged in order to give the statute the meaning which was intended by the lawmakers.” See also, e.g., *Miers v. Brouse*, 153 Tex. 511, 271 S.W.2d 419 (1954); *Prudential Health Care Plan, Inc. v. Commissioner of Ins.*, 626 S.W.2d 822, 827 (Tex.App.-Austin 1981); *Board of Ins. Comm'rs v. Sproles Motor Freight Lines, Inc.*, 94 S.W.2d 769, 775 (Tex.Civ.App.—Fort Worth 1936, writ ref'd); and Tex. Gov't Code Ann. § 312.005. Accordingly, this Court must interpret subsection (b) to give the meaning intended by the lawmakers.

To give effect to the legislature’s intention, the phrase “from a trial court ***order*** on a motion to dismiss” [emphasis added] found in Tex. Civ. Prac. & Rem. Code 27.008(b) should be interpreted to mean an order denying a motion to dismiss. Reading Section 27.008(b) in relation to all of Section 27.008, as this Court must do, manifests the understanding the legislature intended to give the TCPA movant, and only the TCPA movant, the right to an accelerated appeal or

writ. The legislature did not intend to give the respondent to a TCPA dismissal motion any option to expedite appellate review but instead requires the respondent to wait until final judgment is entered. See, e.g., Tex. Civ. Prac. & Rem. Code 51.014(a)(12) and *In re Lipsky*, 460 S.W.3d 579 (Texas 2015). This interpretation of the legislature's intent is reinforced by examining the now repealed subsection 27.008(c) and to do otherwise would make the legislature's intent on each Subsection of 27.008 irreconcilable. To be clear, the Texas Legislature only permitted interlocutory appeals to the defendant under Subsection (a) for denial of the TCPA motion by operation of law, subsection (b) required the appeal or writ of the "trial court's order" to be accelerated, and Subsection (c) permitted an appeal or filing of a writ within 60 days of the "trial court's order." If the "trial court's order" included orders granting the TCPA motion then reading Subsection (c) and subsection (b) together creates incongruent results, because it does not make sense to expedite the appeal of a final judgment while at the same time giving the respondent an additional 30 days to appeal. Thus, "trial court's order" referenced in Subsection (b) was intended by the legislature to mean an order denying the TCPA motion. The term "trial court's order" was not expanded when the legislature amended both Sections 27.008 and 51.014(a) in 2013. This amendment reinforced the legislature's intent to only give the TCPA movant the right to an expedited appellate review. See, e.g., Tex. Civ. Prac. & Rem. Code 51.014(a)(12).

Looking beyond just Section 27.008 to the context of the statute as a whole, the general purpose of the TCPA is to provide an expeditious method for defendants (TCPA movants) to seek early dismissal of claims endangering their exercise of constitutional rights (see Tex. Civ. Prac. & Rem. Code 27.002). The TCPA hearing must be heard no later than the thirtieth day after the service of the motion, Tex. Civ. Prac. & Rem. Code 27.004(a), and the trial court must rule no later than the thirtieth day following the hearing, Tex. Civ. Prac. & Rem. Code 27.005(a). Thus, Appellee's effort to expand Section 27.008(b)'s privilege of an accelerated appeal to the plaintiff contradicts the legislature's clear intent in the statute generally to expedite only defendant's efforts to dismiss. To read Subsection (b) more broadly to also encompass later appeals of final judgments by plaintiffs after the *granting* of TCPA dismissals goes beyond the clear language and intent of the Subsection and is actually contrary to the overall purpose of the statute as a whole.

Significantly for the present case, this Court, in *Jennings v. WallBuilder Presentations, Inc.*, 378 S.W.3d 519 (Tex.App.—Fort Worth, 2012, rev. denied) while not addressing this specific issue, has previously determined that Tex. Civ. Prac. & Rem. Code 27.008(b) must be read in conjunction with and as applying only to Section 27.008(a), thereby providing only for the expedited interlocutory appeal of the denial of a TCPA motion. The *Jennings* opinion also held that the

expediting provision would apply to writs of mandamus challenging denials of TCPA dismissal which resulted as a matter of law from the trial court failing to timely rule on the motion. The vehicle of using a writ of mandamus to review a denial of a TCPA dismissal motion was eventually superseded by the adoption of Tex. Civ. Prac. & Rem. Code Section 51.014(a)(12), which explicitly authorized interlocutory appeals in the case of denials of TCPA dismissal motions, but this Court's reasoning in *Jennings* was cited subsequently by this Court in *In re Lipsky*, 411 S.W.3d 530, which was subsequently upheld upon review by the Supreme Court (460 S.W.3d 579).

Other appellate courts, while not addressing Appellee's assertion directly, have also suggested in the language of their opinions that the expedited appeal process provided for in Tex. Civ. Prac. & Rem. Code 27.008(b) applies only to interlocutory appeals based on the failure of the trial court to make a timely ruling on the TCPA motion as provided for in Section 27.008(a) or on the denial by the trial court of the TCPA motion as provided for in Tex. Civ. Prac. & Rem. Code 51.014(a)(12). See, for example, the following: *Schlumberger Limited v. Rutherford*, 472 S.W.3d 881, 887 (Tex.App.—Houston [1st Dist.] 2015) ("By contract, Section 27.008(a) provides that 'the moving party may appeal' when a Section 27.003 motion to dismiss is denied by operation of law, and Section 51.014(a)(12) provides for appeal of an interlocutory order that 'denies' such a

motion. Under Section 27.008(b), *both these types of appeals* must be expedited.", emphasis added and internal citations omitted); *de la Torre v. de la Torre*, 2020 WL 6018572, 2 (Tex.App.—Austin 2020) ("Regardless of whether the motion is *denied by the trial court or by operation of law*, a party design to appeal must do so within twenty days *of the denial*.", emphasis added); and *Miller Weisbrod, L.L.P. v. Llamas-Soforo, M.D.*, 511 S.W.3d 181, 188 (Tex.App.—El Paso 2014) ("We hold we have interlocutory appellate jurisdiction pursuant to Section 27.008 when a trial court *denies a defendant's motion to dismiss* by written order.", emphasis added).

III. AUTHORITIES CITED BY APPELLEE DO NOT ESTABLISH THAT APPEALS OF JUDGMENTS BASED ON GRANTING TCPA DISMISSAL ARE TO BE ACCELERATED

Appellee's effort to pluck language out of cases that did not determine the issue or support the reasoning of the holding should not be relied upon by this Court. Two of the cases relied upon by Appellee, *El-Saleh v. Aldirawi* and *Trane US, Inc. v. Sublett*, do not address this specific issue before this Court. The issue actually before those courts was whether Tex. Civ. Prac. & Rem. Code 27.008(b) authorized an interlocutory appeal of an order granting dismissal. The Court's ruling in *El-Saleh*, for example, was actually as follows: "In light of Section 51.014(a)(12) [of the Civil Practice and Remedies Code], Section 27.008(b) cannot

be read to authorize an interlocutory appeal by either party of an order granting dismissal under Section 27.003. *Schlumberger [Ltd. v. Rutherford],* 472 S.W.3d [881,] at 887 [Tex.App.—Houston [1st Dist.] 2015, no pet.)] (stating that § 27.008(b) "does not expressly confer a right to interlocutory appeal")." Moreover, the result of the decisions in *El-Saleh* and *Trane* were not to deny the Plaintiffs an opportunity to appeal, but simply to require them to wait until after the final judgment was entered in order to do so.

Similarly, in *Deepwell Energy Servs., LLC v. Aveda Trans. and Energy Servs.*, an Eleventh Court of Appeals case cited by the Appellee, the issue actually before the court was whether the order of the trial court judgment which failed to specify the amount of costs awarded was final and appealable, and in *Connor v. Stephenson*, a Third Court of Appeals case, also cited by the Appellee, the issue actually before the Court was whether claims severed following granting of a TCPA motion were final and appealable. Both *Deepwell* and *Connor* are unpublished memorandum opinions in which the same result would have been reached even if the appeal was not accelerated, because in both cases the Appellant had filed their Notice of Appeal or other Motion challenging the Judgment more than 30 days after the Judgment was signed, so any discussion of accelerated timetables is at best dicta.

IV. REQUEST FOR EXTENSION OF TIME TO FILE NOTICE OF

APPEAL

In the event this Court decides to adopt the new interpretation of Tex. Civ. Prac. & Rem. Code 27.008(b) proposed by Appellee, Appellants request and should be granted an extension of time to file their Notice of Appeal. Appellants' late filing was the result of mistake or miscalculation and was not intentional or the result of conscious indifference. As the United States Supreme Court has stated, "it is now fundamental that, once established, these avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *In the Interest of B.G., C.W., E.W., B.B.W., and J.W., Children*, 317 S.W.3d 250, 257 (Texas 2010), citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 111, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966)). The Supreme Court of Texas has further recognized that, "The rules of appellate procedure likewise recognize the goal of just, fair, and equitable resolution of issues by, in part, excusing missed deadlines under certain circumstances," and "Extensions of time may be allowed for filing notices of appeal even in accelerated appeals." *In the Interest of M.N., A Child*, 262 S.W.3d 799, 802-3 (Texas 2008), citing *In re K.A.F.*, 160 S.W.3d 923, 926 (Tex.2005). To limit, restrict, and effectively deny Appellants' right of appeal retroactively based on a new interpretation of a statute would be a violation of their due process rights under the United States and Texas Constitutions.

WHEREFORE, PREMISES CONSIDERED, Appellants pray that this Court deny Appellee's Motion to Dismiss for Want of Jurisdiction, and for such other and further relief as the Court may deem appropriate.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this document, as reported by the word processing program used in the preparation of said document, is prepared in 14-point font and has a final word count of 2571.

/s/ Landon H. Thompson
Landon H. Thompson

CERTIFICATE OF SERVICE

This is to certify that on November 10, 2020 a true and correct copy of the above and foregoing document was served on all parties through the state e-filing system.

/s/ Landon H. Thompson
Landon H. Thompson